

## A case against universal human rights

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The conception of human rights based upon the assumed existence of a human being as such broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except that they were still human. The world found nothing sacred in the abstract nakedness of being human.

– Hannah Arendt, *The Origins of Totalitarianism*<sup>[1]</sup>

In her reflections on the refugees and rejects that were cast out of their political communities as a result of the Second World War, Arendt suggests that the loss of their political status severed all these peoples' ties with humanity.<sup>[2]</sup> This implies that “the right to have rights cannot be derived from any essential quality of the human.”<sup>[3]</sup> This is not an argument in favour of a communitarian conception of rights, which locates the moral basis for rights in the community.<sup>[4]</sup> If anything, Arendt's observation illustrates that communitarian rights are inadequate for those whose communities failed them. Instead, Arendt's argument seems to reject the widely accepted idea that all human beings are by default entitled to a set of basic human rights. This creates a paradoxical distinction between the rights of the human and the rights of the citizen, where the rights of the human “are the rights of those who have no rights, the mere derision of rights.”<sup>[5]</sup> In other words, universal human rights are a void concept that is only invoked as a last measure, and then inevitably to no avail.

This essay seeks to explore whether it is indeed useful to endow the individual with universal human rights. It will first describe the logic that is involved in taking the individual as the “ultimate unit of moral worth ... entitled to equal consideration regardless of contingencies like nationality and citizenship.”<sup>[6]</sup> This position will be referred to as cosmopolitanism. The second section will critique this position from the standpoint postmodernism. The final section will conclude that although it is essential that the individual should have human rights, these cannot be attained through the deliberate resort to universalism that we can find in the cosmopolitan position. Instead, the only possible way of protecting the individual is through emphasising her particularity. There is nothing abstract in the nakedness of being human.

### Universal Human Rights and the Individual

Because it seems rather commonsensical to start with the individual as the basic moral referent, few universal rights advocates have bothered to give explicit reasons for doing so. Instead, cosmopolitans prefer to define their position by comparing it to the communitarian view, which takes states (or communities) as autonomous moral agents. The state as a collective of individuals is claimed to have a moral worth in the sense that it acts on behalf of all those individuals. Kok-Chor Tan dismisses this claim as “metaphysical”, since suffering is inflicted on the individual himself rather than on the state, and attaining justice for the individual seems a much more direct way to prevent suffering than using the state as intermediary.<sup>[7]</sup>

Justice for the individual is subsequently realised by establishing rights, which can be understood as the “legitimate entitlements and claims that people have against relevant others”.<sup>[8]</sup> These rights create correlative duties, calling for forbearance and positive action.<sup>[9]</sup> Since it might not be so clear who those “relevant others” are, it could be argued that it is more important to stipulate these corresponding duties explicitly. Onora O'Neill thus raises the objection that

## A case against universal human rights

Written by Alexander Michiel Kok

human rights create “a rhetoric of reciepience rather than of action”.<sup>[10]</sup> “The hungry know that they have a problem. What would change their prospects would be to know that it was others’ problem too, and that specified others have an obligation to provide them with food.”<sup>[11]</sup> However, Tan points out that this is a purely strategic elaboration on the conceptual moral obligation that has already been constituted by a right.<sup>[12]</sup>

As such, cosmopolitans view rights as having an intrinsic moral value. Rights are the conclusions that derive from theorising at the moral level, and their mere existence embodies a demand for (institutional) change.<sup>[13]</sup> For rights to be considered moral, cosmopolitans therefore argue that there is necessarily an element of abstraction involved. This becomes evident when we mirror their position once more to that of communitarians, who try to base rights on a shared political understanding of justice. According to Charles Jones this is inherently conservative: any claim that goes beyond the accepted notions of justice within a society is doomed to fail (women’s emancipation in a patriarchal society being an example). Jones therefore concludes that “moral views are properly judged not by determining how many people (or cultures) subscribe to them, but by the plausibility of the reasons adduced in their favour.”<sup>[14]</sup> This causes Jones to dismiss widespread political disagreement (“dissensus”) as a factor that should influence theorising about human rights.<sup>[15]</sup> Jones points out that communitarian rights, be they domestic or international, are never wholly consensual and therefore should be considered to have some universal aspect to them. This contradiction makes communitarianism an inconsistent theory.<sup>[16]</sup>

These different epistemological positions concerning the conception of rights create a discussion over particular or universal rights that will always end in disagreement.<sup>[17]</sup> Therefore, we should resort to a third position that transcends these disagreements: a position broadly derived from postmodernism.<sup>[18]</sup> Chris Brown has already pointed out that postmodernism will not be able to bridge the disagreement between communitarianism and cosmopolitanism completely;<sup>[19]</sup> its independence from the latter two will nevertheless provide us with a more constructive angle from which to asses the utility of universal human rights in the next section.

### Postmodernism and human rights

In his brief discussion of postmodernism, Chris Brown remarks that the works produced by this heterogeneous group of authors is “designed to disturb, to disorient, to resist incorporation by conventional scholarship”.<sup>[20]</sup> Brown’s comment should serve as a disclaimer here, as the following section is intended to do just that to the universal human rights position that we have just introduced.

Very crudely put, postmodernism takes issue with the Enlightenment notion that “Man”, as a sovereign, knowing subject (Descartes’ Cogito), is able to produce independent knowledge about a “real” object of study. In modernity, science was taken to be distinctive from other forms of knowledge (“subjective” knowledge); only science could produce real (“objective”) knowledge. Postmodernism denies that there is such a distinction and collapses both forms of knowledge into one (usually just referred to as “texts”). The denial of the objective status of science implies that the subject cannot produce objective knowledge; information produced by the subject does not represent a real, knowable world. Instead, it is merely part of the “intertextual” world of the subject. In other words, the subject produces texts which represent other texts which in turn constitute its (therefore “subjective”) reality.<sup>[21]</sup> As a result, there can be no universal truth claims.<sup>[22]</sup> It is clear why such a viewpoint immediately takes issue with both communitarian and cosmopolitan conceptions of justice, as both theories claim to posses objective knowledge about the individual – be it from a particular or a transcendental source.<sup>[23]</sup> The following section will explore what this means to the universal human rights position that we have introduced above.

First, let us turn to the object that human rights texts attempt to describe: the (deprived) individual. We saw that cosmopolitanism prefers the individual as the ultimate unit of moral worth, dismissing the state as a metaphysical construction. However, from the vantage point of postmodernism “the individual” seems equally problematic: if we cannot adequately describe objective reality, we cannot just narrow the scope of rights down to “humans” without assuming what it means to be human. Some human rights advocates seem aware of this. Jack Donnelly describes the relationship between human rights and political reality as a “self-fulfilling moral prophecy: Treat people like human beings ... and you will get truly human beings.”<sup>[24]</sup> Human rights are thus based on an idea of human potential, a normative understanding of what a human should be.<sup>[25]</sup> This understanding is in turn based on an ideological

## A case against universal human rights

Written by Alexander Michiel Kok

foundation, examples being the notion of basic human needs, human nature or human dignity but also the Holy Bible. As all of these foundations are contentious, human rights ultimately function by a circular logic.<sup>[26]</sup> A particular conception of what humans should be informs a universal ideal to which the particular individual should aspire to attain ideal fulfillment. Donnelly does not find this problematic and holds that we can arrive at human rights from a variety of such understandings, because despite the large variety of foundations there seems to be a “remarkable international consensus” on the content of human rights.<sup>[27]</sup>

However, postmodernists are not as prepared to gloss over this issue.<sup>[28]</sup> Costas Douzinas points out that “[h]umanity has no intrinsic normative value ... it is not a property shared, it has no foundation and no ends, it is the definition of groundlessness.”<sup>[29]</sup> The “human” in human rights should be recognised as a “floating signifier”<sup>[30]</sup>: it is a word empty of all meaning, which can be seized by different political struggles and campaigns. If successfully appropriated, a cause or issue can be presented in the limelight of all the historical symbolism ever connected to the cause of “humanity” as such. Although they consequently always embody particular ideals, human rights are nevertheless presented to be universal. For example, observing the hegemonic neo-liberal human rights rhetoric, Marxists complain that “human rights are effectively the right of white, male property-owners to exchange freely on the market, exploit workers and women, and exert political domination.”<sup>[31]</sup> Identification as a subject of human rights in this sense imposes an ideal of what it means to be human and justifies practices that claim to be furthering universal human rights while actually only safeguarding particular interests.<sup>[32]</sup>

On its negative side, this process excludes those who do not manage to dress their interest in a human rights outfit. “The exclusion from basic rights of non-proper people, that is people with no property, the right colour, race, religion or ideology, has been a main characteristic of modernity.”<sup>[33]</sup> The point here is that the concept of human rights will always be based on a fundamental principle of exclusion. It is only possible to say what constitutes a human rights violation by also excluding that which does not. Although it may be possible to add particular meanings to the universal concept of human rights over time, there will always be other minorities that remain excluded from safeguarding their rights (the “bogus refugee” or the Guantanamo inmate).<sup>[34]</sup> Rights are in this respect modalities of power, and “we can examine power’s mode of operation by witnessing what people are given or deprived which rights at a particular place or point in time.”<sup>[35]</sup>

Both processes can be observed in today’s Libya. Colonel Gaddafi is said to be violating the human rights of his citizens, which calls for intervention by the US and NATO. However, when those same citizens decide to escape the physical danger and get on a boat to Europe, their human rights status is reconsidered and they become migrants, whose human rights claim can easily be deferred by putting them in an internment camp or even preventing them to migrate.<sup>[36]</sup> The West can respond to the same claim in two different ways, not just because it can choose to ignore the duties established by that claim (as was O’Neill’s practical objection), but because they have the power to redefine that moral claim. The relationship that has been established between the creator of the human rights text (the West) and the “human” object of the text is described well by Douzinas, when he states that “in claiming and exercising our rights we reveal ourselves as beings addressed to another. Having rights, living through rights is therefore of greater ontological importance than the contents of these rights.”<sup>[37]</sup>

We saw that cosmopolitans assume that the assertion of a right constitutes a duty directly to an individual. However, postmodernism denies this direct relationship between individual and right. Considering the above, we see how asserting a “universal” right splits the subject of human rights in two. On the one hand we have a group of Mexican women, protesting about the way in which the international economy forces them to work for subsistence wages in maquiladoras. On the other we have a set of legal subjects, the protection of whose interests is at the mercy of the West’s meaning-giving political power. The more these women assert their cause in terms of universal human rights, the more their struggle is depoliticised and turned into a legal matter under the control of the dominant powers.<sup>[38]</sup> Not only does this deny their political claim, it also covers it up by redefining it as an issue that is part of the established system.<sup>[39]</sup>

Some commentators have complained that in this postmodernist reading, it is impossible for the individual to resort to any form of rights for protection.<sup>[40]</sup> Does this mean that the individual is doomed to choose between her inevitable subjection through the hubris of universal human rights on the one hand and a condition of total postmodern

## A case against universal human rights

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abandonment on the other? The next section argues that it does not.

### Towards a postmodern defence of the individual

The postmodern critique has shown that the link between the individual and her rights is not as straightforward as the cosmopolitans from section II would have it. By being able to redefine the “content” of both the right and the individual, the dominant actors in the system manage to appropriate the right as a means to exercise power. This does not necessarily mean, however, that there is no enforceable connection whatsoever between individual’s right-claim and the right. To illustrate this, we should try to specify exactly what kind of rights-claim this exercise of power can deny.

Postmodernists would in this respect distinguish between two different kinds of right-claims:<sup>[41]</sup> on the one hand there are claims that appeal on the ontic level of politics. Politics should in this sense be understood as a form of administration – the administration of a consensus. Every person has their pre-conceived rights, and these rights are linked to what have been established as “valid” claims. These are the kind of claims that cosmopolitans (as well as communitarians) seek to meet. On the other hand we have ontological right-claims, which demand the recognition of a desire which is not part of the (universally) established consensus. These claims appeal on the level of the political, and their purpose is to redefine which desires should justly be met. The political should thus be understood as the sphere in which it is established what the consensus may entail; what should be included and what should be excluded in our conception of justice. This is the kind of claim that the maquiladora workers are making when they question their subordinate position within the global economic system. By appealing to a human right to subsistence, the ontological claim of the maquiladora workers is lost in the ontical game of legal definitions. Postmodernists thus reject the cosmopolitan concept of universal rights, because universal rights force ontological claims into ontic terms. This is another way to explain the gap between the particular and the universal, making it clearer why a forced appeal to the universal depoliticises (“renders unpolitical”) particular claims for inclusion.

The French philosopher Jacques Rancière attempts to overcome this gap by opening right claims up to political dissensus. Jones dismissed this concept in section II as a negligible disagreement of opinions about justice, which must be overcome if “real” justice is to be achieved. Now that postmodernists have demonstrated the impossibility of “real justice”, we should reconsider this move. A human right, rather than being dismissed as a groundless claim because of its unattainable universality, “should be transformed into the opposite–into a grounds for a claim, into a sphere open for dispute.”<sup>[42]</sup> “Dissensus” should in this respect not be understood as a simple difference of opinion on the level of the particular (as in Jones’ conception), but also as a disagreement with the universal. A human rights claim should be understood as the individual’s assertion of her particular disagreement in the face of the political,<sup>[43]</sup> rather than of politics.

This brings Rancière to a not immediately obvious conclusion.

### Conclusion

The Rights of Man are the rights of those who have not the rights that they have and have the rights that they have not.

– Jacques Rancière, *Who is the Subject of the Rights of Man?*<sup>[44]</sup>

This complex quote expresses how Rancière thinks human rights can still form the basis of protection for the individual, despite the difficulties that part III of this essay outlined. Individuals whose universally prescribed human rights are encroached (“those who have not the rights that they have”) can use these universal rights as a precedent to claim a new right that recognises their particular predicament. In concrete terms, by complaining about the inadequate human right conditions in maquiladoras, workers can make a claim to “the rights that they have not” (the right to be properly included in the international political system).

It may be useful in this respect to remember O’Neill’s objection that the same universal rights may lead to different

## A case against universal human rights

Written by Alexander Michiel Kok

particular obligations, for example in the case where women are systematically overburdened.<sup>[45]</sup> For cosmopolitans it is problematic to recognise that a right does not represent the interests of every individual in equal measure, because of the universal nature of the right. O'Neill tries to get around this by considering the particular in the form of obligations. The postmodern position sees the right not as a reason to invoke obligations, but as a reason to challenge the system of universal understandings that causes the inequality.

This conception of human rights is less straightforward and less solid than that of the cosmopolitans. It still leaves plenty of scope for right-claims to be ignored. On the other hand, it does more for those who lack the legal rights to their protection than Arendt's definition of the "naked" human as abstract. Most important however, it recognises the dangerous pitfalls that come with taking rights to have intrinsic moral value. Finally, it holds sacred the particularity that can be found in the nakedness of every human.

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## A case against universal human rights

Written by Alexander Michiel Kok

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<sup>[1]</sup> Hannah Arendt, *The Origins of Totalitarianism*, (London: André Deutsch, 1989), 299.

<sup>[2]</sup> Arendt, *Origins of Totalitarianism*, 299-302

<sup>[3]</sup> Jessica Whyte. "Particular Rights and Absolute Wrongs: Giorgio Agamben on Life and Politics," *Law and Critique*, 20: 2, (2009), 150.

<sup>[4]</sup> Indeed, Arendt herself does not promote communitarianism as a basis for rights either, see Ronald Beiner, "Arendt and nationalism", in *The Cambridge Companion to Hannah Arendt*, ed. Dana Villa, (Cambridge: Cambridge University Press, 2000).

<sup>[5]</sup> Jacques, Rancière. "Who is the Subject of the Rights of Man?" *South Atlantic Quarterly*, 103, 2/3 (2004), 298.

<sup>[6]</sup> Kok-Chor Tan, *Justice without Borders: Cosmopolitanism, Nationalism, and Patriotism*, (Cambridge: Cambridge University Press, 2004), 35.

<sup>[7]</sup> Tan, *Justice without Borders*, 36.

<sup>[8]</sup> Tan, *Justice without Borders*, 47.

<sup>[9]</sup> Tan, *Justice without Borders*, 47.

<sup>[10]</sup> Onora O'Neill, *Bounds of Justice*, (Cambridge: Cambridge University Press, 2000), 100-101.

<sup>[11]</sup> Tan, *Justice without Borders*, 51

<sup>[12]</sup> Tan, *Justice without Borders*, 51-3.

<sup>[13]</sup> Charles, Jones, *Global Justice: Defending Cosmopolitanism*, (Oxford: Oxford University Press, 1999), 180.

<sup>[14]</sup> Jones, *Global Justice*, 184.

<sup>[15]</sup> Jones, *Global Justice*, 184-5.

<sup>[16]</sup> Jones, *Global Justice*, 185-202, passim.

<sup>[17]</sup> Chris Brown, *International Relations Theory: New Normative Approaches*, (London: Harvester Wheatsheaf, 1992), 235.

<sup>[18]</sup> Brown, *New Normative Approaches*, 197-199. Broadly, as this is a highly heterogeneous body of work.

<sup>[19]</sup> Brown, *New Normative Approaches*, 235.

## A case against universal human rights

Written by Alexander Michiel Kok

<sup>[20]</sup> Brown, *New Normative Approaches*, 211.

<sup>[21]</sup> Brown, *New Normative Approaches*, 212-216 passim.

<sup>[22]</sup> Zühtü Arslan, "Taking Rights Less Seriously: Postmodernism and Human Rights", *Res Publica*, 5 (1999), 209-10.

<sup>[23]</sup> Costas Douzinas, *Human Rights and Empire: The political philosophy of cosmopolitanism*, (Abingdon: Routledge-Cavendish, 2007), 93-5.

<sup>[24]</sup> Jack Donnelly, *Universal Human Rights in Theory & Practice; second edition*, (London: Cornell University Press, 2003), 15.

<sup>[25]</sup> Donnelly, *Universal Human Rights*, 14-7.

<sup>[26]</sup> Donnelly, *Universal Human Rights*, 13-4 & 18-20.

<sup>[27]</sup> Donnelly, *Universal Human Rights*, 17. It should be pointed out that Donnelly, despite being a human rights advocate, is not a cosmopolitan in the sense that we have discussed. Cosmopolitans like Jones reject such a "communitarian" road to universalism: *Global Justice*, 184.

<sup>[28]</sup> Brown, *New Normative Approaches*, 198. A useful way to categorize postmodernism is therefore by distinguishing it from foundationalists like Kant and Hegel (who take as their foundation respectively critical reason or the self-positing spirit) and "pale" anti-foundationalists like Donnelly (who are aware of but not bothered by the lack of foundation).

<sup>[29]</sup> Douzinas, *Human Rights and Empire*, 57 (emphasis added).

<sup>[30]</sup> Douzinas, *Human Rights and Empire*, 55.

<sup>[31]</sup> Slavoj Žižek, "Against Human Rights," *New Left Review*, 34, July-August (2005), 7.

<sup>[32]</sup> William Rasch, "Human Rights as Geopolitics: Carl Schmitt and the Legal Form of American Supremacy." *Cultural Critique*, 54, (Spring 2003), 140.

<sup>[33]</sup> Douzinas, *Human Rights and Empire*, 97.

<sup>[34]</sup> Douzinas, *Human Rights and Empire*, 100.

<sup>[35]</sup> Douzinas, *Human Rights and Empire*, 100.

<sup>[36]</sup> Matt Schofield therefore remarks that the "Libyan no-fly zone is also a don't boat zone", *The Kansas City Star*, March 30, 2011. <http://www.kansascity.com/2011/03/30/2757650/commentary-libyan-no-fly-zone.html>

<sup>[37]</sup> Douzinas, *Postmodern Utopia*, 229 (emphasis added).

<sup>[38]</sup> For a more detailed account of the ways in which the individual is split and subjectified by this logic, see Douzinas, *Postmodern Utopia*, 227-32.

<sup>[39]</sup> Douzinas, *Human Rights and Empire*, 108.

<sup>[40]</sup> Michael Salter, "The Impossibility of Human Rights Within a Postmodern Account of Law and Justice", *Journal of Civil Liberties*, 1, 1, March (1996), 63-4. Also, see Arslan, *Postmodernism and Human Rights*, 207-215.

<sup>[41]</sup>

## **A case against universal human rights**

Written by Alexander Michiel Kok

Rancière, Subject of The Rights of Man, passim.

<sup>[42]</sup> Whyte, Particular Rights, 153-4.

<sup>[43]</sup> Žižek, *Against Human Rights*, 7.

<sup>[44]</sup> Rancière, Subject of the Rights of Man, 302

<sup>[45]</sup> O'Neill, *Bounds of Justice*, 109-11.

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